

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 308 OF 2006

Siddivinayak Realities Private Ltd.
a company registered under the
provisions of the Companies Act, 1956
and having its registered office at
International Business Park, Oberoi
Garden Estate, Off.W.E.Highway,
Goregaon(East), Mumbai-400 063.

Petitioners

vs.

1. Tulip Hospitality Services Limited,
a limited Company registered under the
provisions of the Companies Act, 1956 and
having its registered office at Chandermukhi
Building (Basement), Nariman Point,
Mumbai 400 021.

2. Tulip Hotels Private Ltd.,
a limited Company registered under the
provisions of the Companies Act, 1956 and
having its registered office at Chandermukhi
Building (Basement), Nariman Point,
Mumbai 400 021.

3. Tulip Star Hotels Limited,
a limited company registered under the
provisions of the Companies Act, 1956 and
having its registered office at Chandermukhi
Building (Basement), Nariman Point,
Mumbai 400 021.

4. Dr.Ajit Kerkar
Adult, Indian Inhabitant, representing the
Promoters and Directors of Tulip
Hospitality Services Limited, residing
at 11, Naroraji Mansion, 31, Wodehouse
Road, Mumbai-400 039.

Respondents

Mr.Aspi Chinoy, senior counsel with Mr.Janak Dwarkadas,
senior counsel with Mr.P.K.Shroff with Ms.Radhika
Kalpatrai with Ms.Prachi Khandge i/b.M/s.P.K.Shroff &
Co. for the petitioners.

Ms.Usha Purohit with Mr.Leon Samuel & Miss Nerissa
i/b.M/s.Advani & Co. for the respondents.

CORAM : ANOOP V.MOHTA,J.

DATE OF RESERVING JUDGMENT : 17th August, 2006

DATE OF PRONOUNCING JUDGMENT: 4th September, 2006

ORAL JUDGMENT :

The petitioners-original respondents have preferred the present arbitration petition by invoking section 37 of the Arbitration and Conciliation Act, 1996 (for short, "the Arbitration Act, 1996") and thereby challenged a preventive order, passed by the learned Arbitrator, (the tribunal) dated 23rd June, 2006, on an application for interim measure under Section 17 of the Arbitration Act, 1996, preferred by the respondents-original claimants.

2. The relevant portion of the operative part of the impugned order is as under:

26. As parties are prevented from proceeding before the Escrow Agents, in my view, the Arbitration proceedings should be concluded expeditiously. On a suggestion to this effect, parties have readily agreed to expedite the proceedings. Thus by consent of parties I vary the directions given on the 27th day of April, 2006 as follows:
- a) The statement of claim and compilation of documents, relied upon by the claimants, to be filed by the 10th July, 2006.
- b) The reply and counter claim, if any, and compilation of documents relied upon by the Respondents to be filed by 25th August, 2006.

- c) Reply to the counter claim, if any, to be filed by the 22nd day of September, 2006.
- d) Inspection of documents to be completed by the parties by 13th October, 2006.
- e) Statement of admissions and denials of the documents, setting out therein whether the admissions relate only to the execution or also are in respect of the contents of the documents to be filed by the 10th November, 2006.
- f) The meeting for consideration of points of discussion and fixing dates for hearing will be held at 11.00 a.m. on the 17th day of November, 2006 at a venue to be intimated by the Advocates for the Claimants."

3. Before the tribunal there is a dispute pending between the parties relating to their respective rights and obligations under the Master Asset Purchase Agreement (MAPA) dated 31st March, 2005 in reference to the properties described in the schedule therein.

4. The relevant clauses of the MAPA for the purposes of the present Arbitration Petition are clauses 14, 15.3.2, 16-B and 19 which read thus:

"14. **DEFAULT PROVISIONS**

- In case of an event of default being triggered, under the provisions of this Agreement, either by the Purchaser or by the Vendor:
- (a) the fact as to whether an event of default has been so triggered; and
 - (b) the default provisions which will come into effect on such default, as more

particularly set out hereunder,

shall be decided jointly by the solicitors of the Vendor and the Purchaser i.e. Mr.Suresh Talwar and Mr.Anand Bhatt. The two solicitors would be free to consult any third person, if so desired and deemed necessary."

15.3.2. The Purchaser may exercise its option to become the 50% shareholder of the Vendor, in which case the Default Consequences shall be as under:

the Escrow Agents will hand over to the Purchaser the Escrow Documents relating to Tulip Star Hotels Limited and the Purchaser shall be entitled to transfer the 22 Lakh shares of the Vendor held by Tulip Star Hotels Limited in favour of the Purchaser or its nominees.

With regard to the original Escrow Documents relating to the Vendor, the same shall be returned to the Vendor save and except the undated resignation letters, resolutions for appointment of Directors, resignation of Directors and transfer of shares in favour of Purchaser or its nominees which shall be handed over to the Purchaser.

The Purchaser will nominate and the Vendor will appoint three directors on the Board of the Vendor.

From and out the four original directors of the Vendor, two of the directors will resign from the Board of the Vendor.

As a result the oard of the Vendor will comprise five directors, three being nominees of the Purchaser and two being nominees of Tulip Hotels Private Limited.

16B. The purchaser may exercise its option

to become the 50% shareholder of the Vendor, in which case in which case the Default Consequences as set out in clause 15.3.2 above shall be triggered.

19. Arbitration

- . It is agreed by and between the parties hereto that in case any dispute arises between the Parties hereto relating to any of their rights or duties or relating to interpretation of any terms or conditions stipulated herein, the same shall be referred to arbitration under the provisions of the Arbitration and Conciliation Act, 1996, which proceedings shall take place in Mumbai."

5. The following facts are sufficient to deliberate the issue involved in the matter:

(a) As per the MAPA an escrow arrangement has been agreed upon between the petitioners and the respondents, in pursuant of clause 13 of the term-sheet dated 8th March, 2005. The escrow documents therefore have been executed and deposited with Mr.Suresh Talwar, Advocate & Solicitor and Mr.Anand S. Bhatt, Advocate and Solicitor (hereinafter referred to as "Joint Escrow Agents"). Both these Escrow Agents, before and even after the appointment as Joint Escrow Agents regularly doing their professional work also. Both the parties have full knowledge of the Joint Escrow Agents role as Advocate and also as Joint Escrow Agents. They have been working in their dual capacity without any objection.

(a-i) The petitioners and the respondents have executed an undertaking-cum-indemnity in favour of the Joint Escrow Agents on 31st March, 2005 and in which clauses 14, 15 and 16 of MAPA read with the Escrow letters and the authority of the Joint Escrow Agents to hand over and return the Escrow documents are also confirmed.

(a-ii) As averred, the Escrow arrangement is the trust. The Joint Escrow Agents are the trustees who are acting for the benefit of the petitioners and to secure the the payment under the MAPA. The Escrow documents have been in possession with the Joint Escrow Agents till this date.

(b) As per the MAPA, respondent no.1 is the vendor of the first part and respondent nos. 2 and 3 are the first confirming parties of the second part and respondent no.4 is a second confirming party of the third part and the petitioners are the purchasers of the fourth part for the sale of the hotel together with the benefit of additional FSI of the 11 flats and movable property at or for an aggregate consideration of Rs.349.06 crores.

(c) The Joint Escrow Agents have taken various steps in pursuance of MAPA as both the parties have already acted upon the same. The petitioners have deposited the

purchase price of Rs.75,00,00,000/- with the Joint Escrow Agents in their saving accounts at Mumbai. The Joint Escrow Agents have made diverse payments from the said account. There is a balance of Rs.2,31,18,959/- held by the Escrow Agents in trust till date. The petitioners have in pursuance of the mAPA paid Rs.75 crores to the respondents.

(d) The various correspondences exchanged between the parties about the respective rights & obligations and non-fulfillment of the same.

(e) A newspaper article appeared on the front page of the "Times of India" titled "Centre refers City Centaur deals to CBI" based on which the advocate for the petitioners (Mr.Anand Bhatt) addressed a letter dated 21st July, 2005 to Mr.Suresh Talwar, Solicitor/Advocates for the respondents and stated, in the light of the said article that the title to the Centaur property of respondent no.1 would be in a cloud until the CBI completes its probe and gives a clean chit to the transaction under which the Hotel Corporation of India disinvested the said hotel in favour of respondent no.1.

(f) The respondents advocate by letter dated 6th October, 2005 referred to the media reports in respect of CBI enquiry. The reference was also made to an

agreement entered into by the respondent no.1 for the development of shopping mall and supermarket with Nirmal Lifestyle Limited (Nirmal Lifestyle). The respondents further stated that the petitioners were well aware of the existence of the agreement between respondent no.1 and Nirmal Lifestyle and further that Nirmal Lifestyle was a part of the joint venture of the petitioners. A reference was made to the arbitration petition filed by Nirmal Lifestyle against respondent no.1 and about an injunction order dated 6th June, 2005 against respondent no.1 from selling the hotel property. The respondents further stated that the action of Nirmal Lifestyle made respondent no.1 impossible to proceed with obligation under MAPA. The contract stood frustrated as a result of such injunction. The respondents therefore stated that they stood discharged from fulfilling their obligation under MAPA. The respondents have received a sum of Rs.73 crores only. The petitioners were unable to make a scheduled payment under the MAPA. The respondents further stated that they are willing to refund the amount to the petitioners within a reasonable time. The respondents sought consent and/or concurrence with their appointment of an arbitrator.

(g) On 24th October, 2005, the petitioners advocate replied and resisted the allegations contained in the said notice/letter dated 6th October, 2005. Reference

was also made to the mode adopted by the parties in case of such default being triggered by the parties, to be decided jointly by such joint Escrow Agents. Both the Advocates (Joint Escrow Agents) expressed their willingness and readiness to act as an Escrow Agents.

(h) The petitioners therefore called upon the respondents to fix time to take steps before the Joint Escrow Agents. They resisted the suggested name of the Arbitrator and reserved their right to nominate sole Arbitrator and to take steps in accordance with the provisions of the Arbitration Act.

(i) By a further reply dated 27th October, 2005, the respondents stated that though Joint Escrow Agents were appointed in or around September, 2005 Mr. Anand S. Bhatt had resigned from his position as an Escrow Agent. The respondents further agitated that they do not consent to Mr. Bhatt to be reinstated as an Escrow Agent along with Mr. Suresh Talwar as he could not unilaterally reinstate himself. The respondents further insisted that as the contract being frustrated and/or rendered impossible due to change in circumstances, the Escrow Agents cannot resolve this issue. The respondents had called upon the petitioners to appoint and to communicate the name of their Arbitrator.

(j) The petitioner in reply to this, by its letter dated 25th November, 2005, resisted that at no point of time Mr. Anand Bhatt had resigned from this position. Therefore, there was no question of him being reinstated. The petitioners have resisted that MAPA has been frustrated and; the respondents cannot take advantage of their own wrong and/or their inability to perform their obligation under the MAPA. The petitioners, therefore, called upon the respondents to adhere to and implement terms of MAPA and fix a meeting with Escrow Agents to enable them to perform their part as contemplated under MAPA.

(k) In response to above, the respondents by its letter dated 28th November, 2005 stated that as the petitioners did not appoint an Arbitrator, they moved the High Court for appointment of an Arbitrator. The respondents further stated that the petitioners have refused to perform their obligation as a result of the CBI enquiry and this issue in any event cannot be decided by the Escrow Agents.

(l) By a letter dated 12th December, 2005 the petitioners placed the aforesaid facts and circumstances on record by addressing a letter to the Joint Escrow Agents. The petitioners therefore called upon the Joint Escrow Agents to fix time for meeting and venue to take

further actions with a notice to the respondents.

(m) The respondents by letter dated 14th December, 2005 addressed to the Joint Escrow Agents and informed the Joint Escrow Agents that they had already filed application under Section 11 of the Arbitration Act for appointment of an Arbitrator on 29th November, 2005. The respondents further requested the Joint Escrow Agents not to take any action under clause 14 of MAPA as the purview of the dispute between the parties was beyond their scope.

(n) Mr. Anand Bhatt, one of the Joint Escrow Agents, by his letter dated 19th December, 2005 referring to the above letter dated 14th December, 2005 of the respondents, expressed his inability to call a meeting and/or to take action under clause 14 of MAPA.

(o) The petitioners, in view of the letter of the respondents dated 14th December, 2005 filed an Arbitration Petition under Section 9 of the Arbitration Act for various reliefs. By an order dated 25th January, 2006 in the Arbitration Petition No.434/2005, the High Court has passed the following ad-interim order:

"(a) that pending the Arbitral Proceedings between the petitioners and the Respondents, the Award, the Respondents, their servants and the Award, and

agents be restrained from in any manner
impeding or obstructing the Joint Escrow
Agents from acting in accordance with
the terms of Master Assets Purchase
Agreement dated 31st March, 2005, copy
whereof is annexed as Exhibit "F" to the
petition."

The said petition was disposed of by consent on 8th
March, 2006.

(q) Pursuant to the order of the High Court dated 24th
January, 2006 in Arbitration Petition No.434/2005, the
petitioners advocate called upon the Escrow Agents to
fix a meeting to take action on the letter dated 12th
December, 2005. The Escrow Agents by letter dated 13th
February, 2006 appointed 16th February, 2006 a date to
pass a necessary direction.

(r) The respondents advocate by letter dated 15th
February, 2006 addressed to the Escrow Agents, and to
the petitioners informed that they had filed an appeal
against the order dated 24th January, 2006 and,
therefore, prayed for an adjournment for six weeks.

(s) On 16th February, 2006 none appeared for the
respondents before the Escrow Agents, but the
petitioners along with their advocates were present.
There was no order of restraining the Escrow Agents
from proceeding and the matter was fixed on 28th
February, 2006 for direction.

(t) Respondents, on 27th February, 2006, again requested for an adjournment for two weeks. On 28th February, 2006 the Escrow Agents have passed direction and pursuant to which statement of claim has been filed by the petitioners.

(u) On 3rd March, 2006 in the application filed by the respondents under Section 11 of the Arbitration Act, the Tribunal has been constituted.

(v) On 8th March, 2006 the order dated 24th January, 2006 passed in Arbitration Petition No.434/2005 has been confirmed. A liberty has been granted to the parties to apply before the Tribunal for cancellation or modification of the order dated 24th January, 2006.

(w) On 27th March, 2006 the respondents appeared before the Tribunal and filed an interim application under Section 17 of the Arbitration Act, for restraining the Escrow Agents from acting under clause 14 of MAPA. The said application was amended on 5th April, 2006. The petitioners have filed affidavit in reply to the said application. The Tribunal, after hearing both the parties, on 4th April, 2006 has passed the interim order on 12th April, 2006.

(x) The Tribunal has sought clarification of the order

dated 8th March, 2006 passed in Arbitration Petition No.434/2005. No order was passed on 21st April, 2006 on the application filed by the respondents before this Court for clarification.

(y) On 27th April, 2006 the Tribunal refused to modify the order dated 24th January, 2006 as there was no change of circumstances and thereby rejected the interim application filed by the respondents.

(z) The respondents have challenged the said order dated 27th April, 2006 passed by the Tribunal by filing an Arbitration Petition (L) No.218/2006. This Court by its order dated 4th May, 2006 granted liberty for clarification and/or modification of the order dated 8th March, 2006 on all available grounds.

6. The said interim application of the respondents was heard on 16th June, 2006 by the Tribunal and the impugned order was passed. The petitioners, therefore, have preferred the present Arbitration Petition being aggrieved and affected by the portion of the order as referred earlier and specially following underlining part of the order and related reasonings:

"As parties are prevented from proceeding before the Escrow Agents"

There is no application and/or any challenge made by

the respondents against the impugned order.

7. As consented and agreed, the petition is heard finally and proceeded accordingly. Rule. Heard forthwith.

8. The Tribunal, after considering the rival contentions, prima-facie, held and rejected the respondents submissions: The Escrow arrangement has not come into effect; the most of the documents, as per the Escrow arrangement have been deposited with the Escrow Agents; certain monies were deposited with the Escrow Agents; the claimants have been receiving the monies from the Escrow Agents; the declaration-cum-indemnity dated 31st March, 2005 also makes it clear that Escrow arrangement has come into effect and clause 14 of MAPA has to be read as authorising the Escrow Agents to decide whether a default has been triggered by him and then act according to the agreements between the parties. The Tribunal has further held that after accepting the submissions of the counsel for the petitioner that invocation of arbitration under clause 19, MAPA does not preclude the arrangement under clause 14 of MAPA. As the parties have agreed to have their interim right settled in a particular manner, there is no reason why the party should be precluded from proceeding as per

the contractual agreement. The Tribunal has further rejected the contention of the respondents by holding that the Escrow Arrangement is neither an arbitration and/or conciliation; it is not a simple arrangement between the parties; in this case, the Escrow Arrangement has been arrived at to secure the sum of Rs.75 crores paid by the respondents to the claimants; the principle behind this that once the arrangement is acted upon a party cannot resale, having once received the sum of Rs.75 crores. The Tribunal has further observed that though the respondents were willing to bring back the amount received within a period of six months, the fact remains that so long as the claimants have the monies the respondents can seek an enforcement of the arrangement entered into to secure that payment. All these findings remained unchallenged for want of specific arbitration petition and/or counter application by the respondents.

9. The petitioners, however, being aggrieved by the findings and interim measure as ordered by the Tribunal, whereby the parties have been prevented from proceeding before the Escrow Agents by accepting the contention raised by the respondents, who moved an application for interim measure that they have reasonable apprehension that Mr. Anand Bhatt would not be in a position to act independently and fairly and

they having a reasonable apprehension of "bias" on the part of Mr.Anand Bhatt. The Tribunal has further accepted the case of the claimants-respondents that Mr.Anand Bhatt may have to be cross-examined as a witness on one aspect which would have to be adjudicated upon by the Escrow Agents. The Tribunal has further observed in favour of the respondents that the Nirmal Lifestyle have filed a petition against the claimants-respondents. The said Nirmal Lifestyle has 33% shareholding in the respondent-company. M/s.Wadia Ghandhy of which Mr.Anand Bhatt is a senior partner, are representing Nirmal Lifestyle. The claimants entered into MAPA and the Escrow Arrangement on the assurance of Mr.Anand Bhatt that Nirmal Lifestyle would withdraw their petition. The Escrow Agents would have to decide whether such an assurance was given and/or whether non-compliance of the assurance amounts to a breach of MAPA. Mr.Anand Bhatt, therefore, cannot be expected to decide whether or not he had given such an assurance to the claimants and whether noncompliance amounts to a breach. The Tribunal has further observed on the submission of the respondents counsel, that if Mr.Anand Bhatt does not acknowledge and admit his assurance he may have to be examined as a witness and the claimant would have to cross-examine him. As submitted Mr.Anand Bhatt has addressed letters dated 16th June, 2005, 21st July, 2005 (two letters), 25th

June, 2005, 4th August, 2005 and 25th August, 2005 as solicitors for the respondents. Mr. Bhatt has specifically claimed in letter dated 21st July 2005 that the respondents would only be able to perform their part of MAPA after the CBI enquiry is over. Therefore, this letter whether amounts to breach of MAPA is a main question for a decision by the Escrow Agents. The Tribunal has given insightful reasons while passing the impugned order: Those reasons are as follows:

"23. It is clear that the Escrow Agent would have to decide whether there is a breach and if so by whom. They would have to do so after hearing the parties. Therefore clearly they would have to adjudicate. It is settled law that a person cannot be a judge in his own cause. It is further well settled that justice should not only be done but manifestly seen to be done. Undoubtedly parties have appointed their own Advocates as Escrow Agents. But it is not unknown that in such circumstances a time arises where there would be a conflict of interest between duty as an Advocate and duty as the appointed agent. When such conflict arises then the Advocate has to decide whether he wants to continue as an agent, in which case he must give up his position as the Advocate or to continue to act as the Advocate, in which case he may render himself unable to act as an independent agent if the questions involved deal with his own acts.

24. In this case, one of the questions which would arise for consideration by the Escrow Agents, is whether or not Mr. Anand Bhatt had given assurances (about withdrawal of petition by Nirmal Lifestyle Limited) and if so whether a breach of that amounts to breach of MAPA. Without adjudication by an independent adjudicatory body it cannot be assumed that this is a false allegation. Also the question would be whether the letter dated 21st July

2005, whereby it is indicated that the Respondents would complete only after CBI enquiry is over, amounts to default as envisaged by clause 14, MAPA. Mr.Anand Bhatt has signed all letters addressed by M/s.Wadia Gandhi & Company including the letter dt.21st July 2005. In this situation there would be a reasonable apprehension in the minds of the claimant that Mr.Anand Bhatt would not be in a position to decide independently and fairly. As the letter dated 21st July, 2005 has been addressed much after MAPA and the Escrow Arrangement, the fact of the claimants having entered into the Escrow Arrangement knowing that Mr.Anand Bhatt was the Advocate for the Respondents would not prevent them from having a reasonable apprehension. Even otherwise the claim of the claimants, that they had executed on the basis of assurances given by Mr.Anand Bhatt would have to be adjudicated upon. Obviously Mr.Anand Bhatt cannot be the adjudicator on this aspect. It is clarified that this Tribunal is not stating Mr.Anand Bhatt would not decide fairly and honestly. No aspersions are being cast on the integrity of Mr.Anand Bhatt. All that the Tribunal is stating is that it cannot be said that the claimants do not have a reasonable or justified apprehension. For this reason the interim Application would have to be and is allowed in terms of the amended prayer (a). The Respondents are, pending Arbitration, prevented from proceedings before the Escrow Agents. As the High Court has clarified that this Application is to be decided without being influenced by the Orders dated 24th January 2006 and/or 8th March 2006 prayer (b) does not survive.

25. It is clarified that, at this stage, the Tribunal has only considered the Interim Application. Therefore all observations and findings are prima facie."

10. The submission of the learned counsel appearing for the petitioners that the Escrow Agents would not require to adjudicate between the parties is not correct. Considering the mode of settlement arrived at by the parties by appointing their respective Advocate

as Escrow Agents to decide the defaults as per clause 14 of MAPA itself means that the Escrow Agents being expertise on the subject need to hear the parties and thereafter to take decisions based on the facts and circumstances of the case. Therefore, any determination arrived at after consideration of facts for deciding or making a reasoned judgment about the default as contemplated under clause 14 would be a conclusion or resolution reached after consideration. The decision, therefore, mean even otherwise an application of mind by the respective Escrow Agents who would arrive at a particular conclusion on a issue of defaults, if any, between the parties. As noted, any decision given by the Escrow Agents would cause and/or affect the rights of the parties. Once a decision is taken by the Escrow Agents, in either way, other clauses will need to be invoked and the parties will have no choice, as agreed, but to proceed in accordance with the would be direction and/or decision of the Escrow Agents. Considering clause 14 of MAPA, this will be final expression as per the mode adopted by the parties though it is subject to confirmation and/or final adjudication by the Tribunal.

11. It is true in the facts and circumstances of the case that the parties have selected these Escrow Agents with full knowledge of their nature of profession and

experience in the field. The respondents have raised and/or expressed their apprehension on the bias on the part of Mr.Anand Bhatt, at the earliest point of time. This is not the case where a party has raised objection and/or expression an apprehension of bias during and/or after the hearing of the matter. By letter dated 12th December, 2005 the respondents have expressed their apprehension about "bias" and/or "suspicion of bias" against one of the Escrow Agents. Reference has been made in the various letters issued by Mr.Bhatt addressed to the respondents and their respective Advocates which are in connection with the agreements and transaction between the parties and/or related parties. The submissions of the respondents of calling, if necessary, Mr.Anand Bhatt, as a witness and to cross-examine him on various aspects including an assurance given in a litigation between the respondent-company and one Nirmal Lifestyle Limited also cannot be overlooked. The correspondence referring to CBI enquiry as reflected in letter dated 21st July, 2005 to the extent that the respondents would only be able to perform their part of MAPA after the CBI enquiry is over is also relevant factor on various aspects of defaults or various causes of defaults as contemplated under clause 14 of MAPA.

12. The contention that having once agreed particular

mode by the parties, there is no reason now to allow the respondents to frustrate the provision for security for the sum of Rs.75 crores received by the claimants has some force. But in the present case, before the Escrow Agents would commence the proceedings on merit as envisaged by clause 14 of MAPA, the claimants, the respondents, at the earliest point of time itself, have expressed their apprehension of bias. The respondents submission that they are willing to refund the money within a reasonable time is also a relevant factor which cannot be overlooked. The operative part of the impugned order further clarified that the Tribunal has only considered the Interim Application and all findings are only prima facie. The Arbitral proceeding has been, as agreed, already expedited and the Tribunal has also fixed the matter and issued various directions including the parties to file statement of claim and compilation of documents, filing of reply and counter reply and documents, inspection of the documents, statement of admission and denial of documents and even fixed the date of hearing for discussion.

13. The contention that the Arbitrator need to act within the agreed terms and conditions as referred under Section 28(3) of the Arbitration Act though correct, still in the present facts and circumstances of the case as there is a resistance by the respondents

i.e. one of the party to the said Escrow Agents mode/arrangement, the Tribunal having been appointed by the parties, can consider the said provision related to the defaults as contemplated under clause 14 and/or related clause.

14. In the present case, if this mode of clause 14 if not resorted to then there is no such other provision under the agreement whereby the parties can settle their default whether triggered or not. Therefore, there will be no other means of deciding this default, except now, by the Tribunal. In a given case in the absence of such Tribunal, the parties could have no choice but to proceed before the Escrow Agents but as the decision of the Escrow Agents is subject to the Tribunal, the parties are not prejudiced though there is no substitution of such mode is possible at this stage in view of the order passed by the Tribunal. But as observed, in the facts and circumstances of the case, the impugned order cannot be said to amount to modifying the agreed terms by the parties as there would be no mode of settlement of such issue available as sought to be contended by the learned counsel appearing for the petitioner. The parties can definitely submit their respective case based on the facts and circumstances revolving around clause 14 and the other related clause the Tribunal is empowered by

the parties to adjudicate all the issues arising and/or related to the agreements and arrangements between them.

15. In the present case, the Escrow Agents are acting in a dual capacity. The parties have agreed to appoint such person as an Escrow Agent, but still having raised a doubt on a foundation of facts and circumstances of the case as referred above, the principle of fair and unbiased decision need to be tested. The Tribunal has after considering the material available on the record comes to the conclusion by accepting the above principle of natural justice which in no way can be said to be unsupported by any material on record.

16. It is difficult to prove the state of mind of a person. Therefore, what we have to see is whether there is likelihood of or reasonable ground for being biased, as observed in **A.K.Kraipak & ors. v. Union of India & ors., AIR 1970 SC 150**, "In deciding the question of bias we have to take into consideration the human probabilities and ordinary course of human conduct".

17. The Apex Court in **Rattan Lal Sharma v. Managing Committee, 1993 (4) SCC 10**, while considering various facets of natural justice, whenever involves civil

consequences observed thus:

"One of the cardinal principles of natural justice is nemo debet esse iudex in propria causa (no man shall be a judge in his own cause). The deciding authority must be impartial and without bias. It has been held by this Court in *Secretary to Government, Transport Department v. Munuswamy Mudaliar (AIR 1968 SC 850)* that a predisposition to decide for or against one party without proper regard to the true merits of the dispute is bias. Personal bias is one of the three major limbs of bias namely pecuniary bias, personal bias and official bias.

.....

For appreciating a case of personal bias or bias to the subject matter of the test is whether there was a real likelihood of a bias even though such bias has not in fact taken place.

(i) *De Smith* in his *Judicial Review* of *Administrative Action*, (198) at page 262 has observed that a real likelihood of bias means at least substantial possibility of bias.

(ii) In *R.V. Sunderland Justices ((1901) 2 KB 357, 373)* it has been held that the court will have to judge the matter as a reasonable man would judge of any matter in the conduct of his own business.

(iii) In *R.V. Sussex Justices (1923 All ER Rep. 233)* it has been indicated that answer to the question whether there was a real likelihood of bias depends not upon what actually was done but upon what might appear to be done.

(iv) In *Halsbury's Laws of England*, 4th Edn., Vol.2, para 551, it has been indicated that the test of bias is whether a reasonable intelligent man, fully apprised of all the circumstances, would feel a serious apprehension of bias.

(v) The same principle has also been accepted by this Court in *Manak Lal v. Dr. Prem Chand (AIR 1957 SC 425)*. This Court has laid down that the test is not whether in fact, a bias has affected the judgment; the test always is and must be whether a litigant could

reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. It is in this sense that it is often said that justice must not only be done but must also appear to be done."

18. In **S. Parthasarathi v. State of Andhra Pradesh**, **AIR 1973 SC 2701, (at 2705)** the Apex Court has observed

while considering the test of "real likelihood and reasonable suspicion" as under:

"16. The tests of "real likelihood" and "reasonable suspicion" are really inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it. Whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The court must look at the impression which other people have. This follows from the principle that justice must not only be done but seem to be done. If right minded persons would think that there is real likelihood of bias on the part of an inquiring officer, he must not conduct the enquiry, nevertheless there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent. The court will not inquire whether he was really prejudiced. If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision (see per Lord Denning, M.R. in *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* (1968) 3 WLR 694 at p. 707 - etc.) We should not, however, be understood to deny that the court might with greater propriety apply the "reasonable suspicion" test in criminal or in proceedings analogous to criminal proceedings."

19. In the present fact, therefore, it cannot be said

that Mr. Anand Bhatt was not likely to be unconsciously biased when he would examine the material and/or submission placed before them. It is possible that he may take another view after hearing and/or considering the material placed on record, but as objections raised at the initial stage of the proceedings on the various aspects concerning the transactions and agreements between the parties and as Mr. Anand Bhatt has already expressed some views on the matter, the reasonable apprehension of bias and/or suspicion of bias just cannot be overlooked. The Tribunal is in the command of the arbitration proceeding between the parties to settle the disputes as contemplated under clause 19 of MAPA agreement which includes even the interpretation and/or related disputes arising out of between the parties. The impression as expressed is from the point of view of a third person. The determination is on the basis of the material before the Tribunal. From the point of view of a reasonable intelligent man there is a real likelihood or a possibility of bias. Therefore, no case has been made out under Section 37 of the Arbitration Act and even otherwise to interfere with the findings arrived at by the Tribunal. The order as such is within the frame work of law and the record.

20. Taking all into account, the present arbitration petition is dismissed. Rule is discharged. No costs.

(ANOOP V. MOHTA, J.)